No. 83-878

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT W. HADLEY,

Petitioner,

vs.

COUNTY OF DU PAGE, a body corporate and politic; et al., Du Page County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SIDNEY Z. KARASIK
Suite 815
134 South LaSalle Street
Chicago, IL 60603
(312) 782-7295
Attorney for Petitioner

Of Counsel:
GARY E. DIENSTAG
SPRINGER, CASEY, HAAS,
DIENSTAG & SILVERMAN
Suite 2100
100 West Monroe Street
Chicago, IL 60603
(312) 372-0800

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether the Court of Appeals has failed to follow decisions of this Court which require affording due process protection and a name-clearing hearing to a long-time government employee discharged in the midst of public stigmatizing statements implying criminal conduct made against him by his government employer?

2. Whether the Court of Appeals has ignored pronouncements of this Court establishing the doctrine of "de facto" tenure for a long term government employee having a legitimate expectancy of job security?

3. Whether the Court of Appeals failed to observe established rulings of this Court restricting the entry of summary judgment when material issues of fact exist?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Robert W. Hadley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois. The district court entered summary judgment in favor of respondents and against petitioner herein in a civil rights action brought pursuant to Title 42, Sec. 1983 of the U.S. Code.

OPINIONS BELOW

The August 30, 1983 opinion of the Court of Appeals affirming the district court is attached hereto as Appendix A. The district court rendered an unpublished opinion granting respondents' motion for summary judgment which is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals for the Seventh Circuit was entered on August 30, 1983, and this petition for certiorari was timely filed within 90 days of that date.

STATUTES AND RULES INVOLVED

Civil Rights Act, United States Code, Title 42, Sec. 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Rule 56(c) of the Federal Rules of Civil Procedure, United States Code, Title 28, Sec. 56(c):

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

Petitioner brought this action for damages under 42 USC Sections 1983 and 1985 against respondents DuPage County and various individual members of the DuPage County Board (hereinafter "respondents") alleging a deprivation of his constitutional right to due process resulting from his termination of employment as Superintendent/Director of Public Works by the County Board. Respondents filed a Motion for Summary Judgment which was granted by the district court, which ruling was affirmed by the Court of Appeals. (See Appendix A attached hereto).

In ruling on respondents' motion for summary judgment, the district court had before it the complaint and answer, interrogatory answers filed by all parties, the deposition of petitioner (including attached exhibits), and the affidavit of petitioner. The respondents did not submit any affidavits or in any way contest the truthfulness of the allegations and statements made by petitioner. Thus, for purposes of review herein, the following facts are unrefuted:

A. Petitioner's Complaint.

Petitioner's complaint against DuPage County and the members of the County Board alleged that he was employed by DuPage County continuously since 1964 and attained the position of Superintendent of Public Works; that at all times pertinent herein he performed his duties in an "efficient, creditable and acceptable manner;" that on December 20, 1978, "without just cause, without prior notice and without a hearing" petitioner was discharged from his position and publicly humiliated by adverse pub-

licity; that respondents intimated that petitioner was guilty of criminal conduct, but no formal charge was ever made nor was petitioner given an opportunity for a name-clearing hearing or given an opportunity to rebut the charges; that petitioner was suffering from a severe nervous breakdown at the time he was discharged and the nervous breakdown resulted from the personal humiliation suffered by him, and finally, that as a consequence of respondents' acts, petitioner was compelled to leave the jurisdiction and find employment at a substantial reduction in salary, and he has suffered anxiety, stress and embarrassment as a result. (R 1)

B. Petitioner's Deposition.

Petitioner Robert Hadley testified that he was an employee of DuPage County continuously from 1964. He was promoted by the DuPage County Board to Superintendent of Public Works for DuPage County in 1970 and served in that capacity until he was peremptorily fired on December 20, 1978, without a hearing. (R 39) The firing was done by the President of the County Board, Jack Kneupfer, with a simultaneous announcement to the press, and without the required prior approval of the Board. The dismissal also came at a time when petitioner was in the hospital. During his hospitalization, a request for petitioner-er's resignation was even made to petitioner's wife, which she refused. (P 56, 73)*

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* Page references herein are to the deposition of Robert Hadley taken in two sessions on May 21, 1981 and June 25, 1981. The exhibits to the deposition, consisting of numerous newspaper articles, were all set forth in a supplemental appendix submitted to the Court of Appeals and are set forth, in pertinent part, in the text of this Petition.

At the time of petitioner's termination, the Public Works Department and petitioner personally were the targets of an investigation by the DuPage County State's Attorney's Office. No less than 43 newspaper articles were published during the period October 24, 1978 through August 18, 1980 in which petitioner's name was prominently mentioned in connection with a State's Attorney's investigation of "mismanagement" in the Public Works Department. The articles implied that petitioner had either condoned or directly participated in criminal activities in connection with his management of the department, specifically alleged illegal collection of sewer and water connection fees and use of County money to buy auto parts for alleged personal auto repairs. (See Supplemental Appendix).

In many of the articles, all of which mention the State's Attorney's criminal investigation and petitioner's name in the same context, several of the Board members are quoted directly. Thus, at one point respondent Charles Kaelin indicated Fitzsimmons' (State's Attorney) investigation "might be concluded by Friday." (Supp. Appendix p. 2)

Respondent Jane Spirgel was quoted in the press as water division in the midst of the investigation, and stated "I am also concerned that all this controversy is surrounding a key department Head" and "I am concerned that these allegations are not being brought to the committee sooner." (Supp. Appendix p. 6) She also stated she hated to leave the public works committee because "we are in the middle of the investigation." (Supp. Appendix p. 13)

Respondent Bud Kirchoff was quoted as saying that he "relayed the allegations (against Hadley) to DuPage State's Attorney J. Michael Fitzsimmons." (Supp. Appendix p. 8)

Respondent Charles Vaughn stated "no one but Hadley knew of all the contracts the public works department had entered into." (Supp. Appendix p. 14).

Respondent Jack Kneupfer, in the midst of the investigation, fired plaintiff and stated in the press that "the termination is based on Mr. Hadley's inability to efficiently manage the department and has nothing to do with the status of his health." (Supp. Appendix p. 18) He also stated the action was "not based on any *pending criminal indictments* . . ." (Supp. Appendix p. 20)

After the filing of this suit, respondent Kneupfer was quoted in the press as giving an example of petitioner's "mismanagement:" (Supp. Appendix p. 44)

> "Kneupfer also mentioned the falsification of reports submitted to the Illinois Environmental Protection Agency as evidence of mismanagement."

Petitioner further testified that he has never been indicted, formally charged with any criminal misconduct, brought before the Grand Jury, nor accused in any formal way except by innuendo of the respondents and in the press. (Dep. P. 53)

He was fired on December 22, 1978, while he was in the hospital, without being given a name-clearing hearing and without formal approval of the County Board. The Board ratified the firing on December 28, 1978, after going into executive session. Petitioner was never able to appear before the County Board or otherwise defend his good name.

The Board was advised by the State's Attorney that it would subject itself to a suit if petitioner were fired under these circumstances in the middle of an investigation.

(Supp. Appendix p. 20) The firing of petitioner was also objected to by two board members who questioned releasing the matter to the press without giving him the opportunity to be heard. (Supp. Appendix p. 22)

Petitioner testified that as a result of losing his job under these circumstances, he and his wife and seven children were required to leave the community and move out of State. (Dep. P. 32) At one point his young son even said "Daddy, did you steal a million dollars?" (Dep. P. 9) Petitioner suffered severe mental depression and had to take a lower paying job involving no responsibility. He contacted several engineering firms that didn't want anything to do with him because they were afraid they would lose business from the County. (Dep. P. 65) He also applied for a job with the Wheaton Sanitary District but was told to withdraw because of the adverse publicity. (Dep. P. 11) His wife had to give up a business in order to move with him.

Petitioner stated that prior to leaving the community, he had been a lifelong resident of Wheaton. (Rep. P. 42) No one ever formally accused him or ever told him they were dissatisfied with his job performance even though he voluntarily gave three interviews to the State's Attorney's Office and refused to take the Fifth Amendment. (Dep. P. 79) He was left hanging in midair. (Rep. P. 23) He never refused to resign. (Dep. P. 4) He requested a medical leave of absence to which the County Board never replied. (Dep. P. 40) Petitioner submitted a letter to the Board in January, 1979, requesting reinstatement of his job which was also never replied to. (Dep. P. 25) Petitioner stated "I have never had the chance to clear my name, never given the opportunity." (Dep. P. 73) "They didn't give me the chance to defend myself." (Dep. P. 85)

C. Petitioner's Affidavit.

In opposition to respondents' motion for summary judgment, petitioner also submitted an unrefuted affidavit. (R 59) In this affidavit he stated under oath that during all of his employment for DuPage County during the period 1964-1978 he "was assured by the then incumbent members of the DuPage County Board and his other supervisors that his job as Superintendent of Public Works was secure and would not be terminated so long as affiant performed his duties in an efficient and satisfactory manner."

Petitioner further stated in his uncontradicted affidavit that during all of the period of his employment, DuPage County observed an unwritten policy toward its personnel in which an employee was afforded a hearing in respect to any dispute concerning his employment; that as a result he was assured and therefore formed the reasonable expectancy that such grievance procedures would be in force and effect in his case.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH ESTABLISHED HOLDINGS OF THIS COURT THAT DISMISSAL OF A GOVERNMENT EMPLOYEE, ACCOMPANIED BY A CHARGE AGAINST HIM THAT MIGHT SERIOUSLY DAMAGE HIS STANDING AND ASSOCIATION IN HIS COMMUNITY, ENTITLES THE EMPLOYEE TO A NAME-CLEARING HEARING AND THE PROTECTION OF THE 14TH AMENDMENT RIGHT TO DUE PROCESS.

Petitioner was discharged from his governmental position without prior notice and without being afforded a name-clearing hearing, in the midst of a pending, but unresolved criminal investigation directed against him for alleged "criminal mismanagement." The criminal investigation was initiated in whole or in part by his employer, the respondent members of the County Board, and conducted by the State's Attorney of the respondent DuPage County.

This factual situation is nearly identical to that which existed in *Owen* v. *City of Independence*, 445 U.S. 662 (1980) where this Court held under similar circumstances, that the constitutional protection of the Fourteenth Amendment entitles the discharged employee to a name-clearing hearing. Yet, inexplicably, the Court of Appeals refused to follow this Court's decision.

The record reflects that prior to petitioner's actual discharge, a series of approximately 43 newspaper articles appeared in the press, all dealing with the said State's

Attorneys investigation of petitioner's department and mentioning petitioner's name in the same breath. These articles drew the conclusion that "Hadley is under investigation by the DuPage State's Attorney's Office stemming from charges of *criminal mismanagement.* (Supp. Appendix P. 35)

At the time of petitioner's discharge and while he was in the hospital, respondent Kneupfer, president of the County Board, announced to the press that petitioner's discharge was due to "mismanagement" and not related to "any pending criminal indictments." This said announcement, to any reader who had been following the scenario, clearly gave the impression that (a) petitioner was being fired for the same "mismanagement" that had caused the pending criminal investigation in the first place, and (b) that an indictment was currently pending against petitioner, of which there was none.

Both the District Court and the Court of Appeals held that despite the accusatory atmosphere and context within which this and other statements were made, it "does not include any inference of dishonest or criminal misconduct." (Opinion of Court of Appeals P. 17)

Yet, shortly after this suit was filed, respondent Kneupfer gave an "example" of exactly what he earlier referred to as the "mismanagement" of petitioner, leaving no mistake that he had referred to *criminal* misconduct. He stated: (Supp. Appendix p. 44)

> "Kneupfer also mentioned falsification of reports submitted to the Illinois Environmental Protection Agency as evidence of mismanagement . . ."

This latter statement alone, which clearly accuses petitioner of dishonesty, if not criminal wrongdoing, would

entitle petitioner to a name-clearing hearing. However, to even suggest as Kneupfer did earlier, that there was a *pending* criminal indictment against petitioner, when in fact the matter had not even been presented to the Grand Jury, is a clearly stigmatizing statement under the test of this Court laid down in *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). In fact, it is libelous per se under State law. *Dombrowski* v. *Shore Galleries*, 59 Ill.App.3d 237, 376 N.E.2d 45 (1979); *Zeinfeld* v. *Hayes Freight*, 41 Ill.2d 345, 243 N.E.2d 217 (1969). To determine the stigmatizing effect of this and prior statements it is necessary, under Illinois law, to view the entire context and atmosphere within which the statements were made. *Chapski* v. *Copley Press*, 92 Ill.2d 344, 442 N.E.2d 195 (1982).

Respondent Kneupfer did not distinguish to the general public the level of mismanagement of Hadley causing his discharge from that level of mismanagement which warranted a criminal investigation, and it was certainly the impression of the general public, in view of Kneupfer's statement that there was a "pending indictment," that petitioner was guilty of criminal wrongdoing. Respondent Kneupfer has expressly admitted to the press that the "mismanagement" of Hadley included dishonesty on his part.

The instant case presents the classic example of a public employee being discharged in the midst of a stigmatizing "witch-hunt" against him, initiated either directly or indirectly, by his employer without being given the opportunity to clear his good name in a public forum. Petitioner, under the circumstances, had a liberty interest which was violated by the infliction of a stigma to his reputation.

This Court has specifically held that "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constrantineau,* 400 U.S. 433 (1971).

In *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972), this Court held that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and association in his community" triggers the due process right to a hearing at which the employee can refute the charges and publicly clear his name. See also *Paul* v. *Davis,* 424 U.S. 693, 719 (1976); *Owen* v. *City of Independence,* 445 U.S. 662 (1980); *Code* v. *Velger,* 429 U.S. 624 (1976).

From the foregoing, it is evident that the concept of liberty pronounced by this Court recognizes two particular interests of a public employee: (1) the protection of his good name, reputation, honor and integrity, and (2) his freedom to take advantage of other employment opportunities. *Lipp* v. *Board of Education,* 470 F.2d 802 (7th Cir. 1972); *Weathers* v. *West Uma,* 530 F.2d 1335 (10th Cir. 1976).

The Court of Appeals rejected the established rules laid down by this Court and attributed no wrongdoing to the defendants without affording petitioner a jury trial.

It must be remembered, however, that petitioner's discharge occurred amidst a *County Board initiated* criminal investigation by the DuPage County State's Attorney of the Department of Public Works and of petitioner himself. This entire State's Attorney's investigation was instigated at the instance and request of County Board members and then even reported to the press by them.

Thus, on October 24, 1978, an article appeared as follows (Supp. Appendix p. 1):

> "DuPage County State's Attorney J. Michael Fitzsimmons Monday initiated an investigation into allegations of mismanagement in the DuPage County Public Works Department.
>
> County Board member Donald E. Carrol (D - Beusenville) told the Daily Journal Monday that he would call for a full audit of the Public Works Department at today's County Board Meeting.
>
> The Public Works and Road Committee indicated Monday that the State's Attorney would investigate 'the allegations which may have legal implications, while the Committee examined other allegations.' "

And on October 25, 1978, the following article appeared (Supp. Appendix p. 2):

> "DuPage County State's Attorney J. Michael Fitzsimmons Monday initiated the investigation into allegations of mismanagement in the Public Works Department *in response to a request for an investigation of the Department of the County Board's Public Works and Roads Committee.* (Emphasis added)
>
> The County Board member indicated Tuesday he would turn over the names of the four (4) employees and his informants to Fitzsimmons.
>
> County Board member Kaelin indicated Fitzsimmons' investigation might be concluded by Friday."

This entire stigmaitzing atmosphere in the midst of which petitioner was fired was thus created or contributed to either directly or indirectly by respondents' initiation of the investigation. All of the adverse publicity generated against petitioner stems from the respondents or other employees of the respondent DuPage County.

Several of the respondents otherwise *directly* contributed to the publicity surrounding the criminal investigation at or about the time of petitioner's discharge. (See Statement of the Case herein)

All of these statements must also be viewed in the climate in which they were made, a climate of a pending criminal investigation where numerous newspaper articles are being written specifically naming petitioner and the criminal investigation in one breath. The natural inference the public derives is that petitioner was discharged, not because of mere mismanagement, but because of *criminal* mismanagement. Subsequent newspaper articles draw the conclusion and specifically refer to the investigation of Hadley's alleged "criminal mismanagement." (Supp. Appendix P. 34 and 35) At least one circuit has held that this precise factual situation created a question of fact which precludes the granting of summary judgment. *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980).

The foregoing establishes, at the very least, that a question of fact exists as to whether petitioner lost employment opportunities as a result of the stigma inflicted upon him. It is not necessary however that "a detailed bill of particulars" be submitted if the respondents have created or contributed to a false and defamatory impression. *White* v. *Thomas*, 660 F.2d 680 (5th Cir. 1981); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 447 (2nd Cir. 1980).

If the Court of Appeals decision is allowed to stand, a government employer will be allowed to initiate a stigmatizing and highly publicized criminal investigation of an employee without cause, fire that employee in the midst

of the investigation, and not afford him a name-clearing hearing. Surely our Constitution as well as basic principles of fairness, deem that a public employee be afforded protection under the circumstances. In essence, petitioner, who has never been charged with any criminal wrongdoing, has been branded a thief by his employer and not allowed to defend himself.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRONOUNCEMENTS THAT A PROPERTY INTEREST IN ONE'S EMPLOYMENT MAY EXIST THROUGH "DE FACTO" TENURE ESTABLISHED BY POLICIES AND PRACTICES OF THE EMPLOYER.

The district court and the Court of Appeals held that petitioner had no property interest in his continued employment which would trigger the right to a hearing prior to discharge since he did not enjoy formal tenure. Petitioner submits, however, that at the very least, a question of fact exists as to whether he did have sufficient "de facto" tenure in his employment to enjoy the constitutional protection of the Fourteenth Amendment under the circumstances.

This Court has made it clear that *formal* job tenure is not required for a public employee to enjoy Due Process guarantees. A property interest sufficient to trigger Due Process protection may be created by statute, by contract, or by less formal "understandings." *Perry* v. *Sinderman*, 408 U.S. 593 (1972). This Court made clear in its landmark cases of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry*, supra, that "property" denotes a broad range of interests that are secured by existing rules or understandings." *Roth* at 577; *Perry* at 601.

In reversing the entry of summary judgment in favor of the defendant, this Court stated in *Perry* (P. 602):

> "In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.' We disagree with the Court of Appeals insofar as it held that mere subjective 'expectancy' is protected by procedural due process, but *we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'* " (Emphasis added)

Later cases have found a protected property right sufficient to invoke Fourteenth Amendment Due Process protection in situations involving informal "understandings" of continued job security. *Callaway* v. *Kirkland*, 320 F. Supp. 1135 (N.D. Ga. 1971) and 334 F.Supp. 103 (N.D. Ga. 1971); *Sartin* v. *City of Columbus Utilities Commission*, 421 F.Supp. 393 (Miss. 1976); *River-Lopez* v. *Gonzalez-Chapel*, 430 F.Supp. 704 (P.R. 1975); *Hawkins* v. *Board of Education of Delaware*, 468 F.Supp. 201 (Del. 1979).

In the instant case, petitioner presented an unrefuted affidavit to the district court in which he stated, under oath, that during all of his employment for DuPage County he "was assured by the then incumbent members of the DuPage County Board and his superiors that his job as Superintendent of Public Works was secure and would not be terminated so long as affiant performed his duties in an efficient and satisfactory manner." He stated that this policy was merely codified in the DuPage County Board personnel policy manual, promulgated after his dis-

charge, which provided the following statement of policy applicable to *all* employees: (R 54)

> "Every employee appointed to fill a permanent position with the county must successfully complete a probationary period of one year. *At the close of the one year period your employment will continue if your work has been satisfactory.*" (Emphasis added).

Petitioner's unrefuted affidavit also stated that all during the period of his employment, DuPage County followed an *unwritten* policy toward its personnel in which an employee was afforded a hearing in respect to any dispute concerning his employment and that as a result petitioner formed a reasonable expectancy that such grievance procedures would be in force and effect in his case. (R 59) This unwritten policy, applicable to petitioner, is the same policy now written and approved by the DuPage County Board. Respondents were conspicuous, however, in failing to contravert any of these verified allegations in the District Court.

The foregoing demonstrates, at the very least, that aside from petitioner's own reasonable expectancy of job security resulting from 14 years of continuous and satisfactory performance of his job, that the expectancy was truly not "unilateral" as the district court concluded, but was also founded upon acts and assurances of the respondents which amount to "de facto" tenure exactly wtihin the meaning of *Perry* v. *Sinderman*, supra.*

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* It should be noted that the County Board President Kneupfer fired petitioner prior to any resolution or vote granting him power to act. Statutory power is granted only to a County Board as a body aggregate, not as individuals. 34 Ill.Rev.Stat. Sec. 401, et seq. *See also: Cawley* v. *People*, 95 Ill. 249 (1880). It would thus appear that the firing itself was an illegal act.

III. THE COURT OF APPEALS FAILED TO FOLLOW ESTABLISHED GUIDELINES OF THIS COURT IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

The rules governing summary judgment are settled and familiar, but were flagrantly ignored by the district court and Court of Appeals in the instant case. This Court has said that summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case show that there is *no genuine issue* as to any material fact that the moving party is entitled to a judgment as a matter of law. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962). Authority for the granting of summary judgment under Rule 56 of the Federal Rules of Civil Procedure exists only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine issue remains for trial, for the purpose of the rule is not to cut litigatns off from their right of trial by jury if they really have issues to try. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944).

It has been held that one who moves for the drastic remedy of summary judgment has the burden of demonstrating that there is no genuine issue of fact and that any doubt as to the existence of such an issue is resolved against him. *Cedillo* v. *International Association of Bridge & Structural Iron Workers, etc.,* 603 F.2d 7, 10 (7th Cir. 1979).

Further, a complaint, when tested by summary judgment procedures, must be given the benefit of every possible implication. *Schaefer* v. *First National Bank of Lincolnwood,* 509 F.2d 1287, 1297 (7th Cir. 1975).

In the instant case, the Court of Appeals cut off petitioner's right to a jury trial in a situation where substantial issues of fact exist. It must be remembered that *nothing* was presented in support of respondents' motion for summary judgment. Not one respondent has given a deposition in this cause. Respondent Kneupfer has not even testified as to his intentions in making his defamatory statements. Respondents' flagrant violations of petitioner's rights have gone unremedied.

Such error cries out for the exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

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SIDNEY Z. KARASIK
Suite 815
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

Of Counsel:
GARY E. DIENSTAG
SPRINGER, CASEY, HAAS,
DIENSTAG & SILVERMAN
Suite 2100
100 West Monroe Street
Chicago, Illinois 60603
(312) 372-0800

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2222

ROBERT W. HADLEY,

Plaintiff-Appellant,

v.

COUNTY OF DU PAGE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 5959—John A. Nordberg, *Judge.*

ARGUED FEBRUARY 14, 1983—DECIDED AUGUST 30, 1983

Before CUDAHY and COFFEY, *Circuit Judges* and VAN PELT, *Senior District Judge.**

COFFEY, *Circuit Judge.* The plaintiff, Robert W. Hadley, commenced this action under 42 U.S.C. §§ 1983 and 1985 seeking damages against Du Page County, Illinois and various individual members of the Du Page County Board. He alleged a violation of his constitutional due process rights based on the County Board's failure to provide a hearing either before or after his dismissal as the Du Page County Superintendent of Public Works. The main issue to be addressed in this appeal is whether

* The Honorable Robert Van Pelt, Senior District Judge for the District of Nebraska, is sitting by designation.

the district court erred in granting the defendants' motion for summary judgment. We affirm the district court's grant of summary judgment to the defendants.

I.

Hadley obtained employment with Du Page County in 1964, and was promoted to the position of Superintendent of Public Works in 1970. He served in that capacity until his termination on December 20, 1978. Several months prior to his dismissal, Hadley fired Robert Mundorf, an employee of the Sewer Department. Although the official reason given for Mundorf's dismissal was his use of the office telephone for personal matters, Mundorf claimed that the true reason for his discharge was the discovery of his preparation of a report on certain irregularities within the Public Works Department. Upon his termination, Mundorf presented allegations of mismanagement in the Department of Public Works to the Public Works Committee of the Du Page County Board. These allegations were turned over to the Du Page County state's attorney who thereupon commenced an investigation into the alleged mismanagement of the Public Works Department. The investigation generated widespread local newspaper coverage and some of the articles made reference to Hadley.

On December 20, 1978, Du Page County Board Chairman Jack T. Knuepfer announced Hadley's dismissal as Superintendent of Public Works. Board Chairman Knuepfer clearly indicated that the reason for Hadley's termination was his inability to efficiently manage the Public Works Department and not any pending criminal indictments or health problems.[1] Six days later, on December 26, the County Board ratified Knuepfer's termination

[1] Hadley suffered a nervous breakdown which required hospitalization and for which he requested a medical leave of absence. His breakdown was allegedly due to the publicity surrounding the criminal investigation prior to his termination.

decision. Hadley was not given, and apparently did not request, a hearing on his dismissal before the County Board. However, Hadley did submit a letter to the Board seeking reinstatement to his previous position. The Board never replied to that letter.

After his dismissal, Hadley attempted to obtain employment in the Du Page County area, but was unsuccessful. He ultimately accepted a position with the Public Works Department in Orange County, Florida at a lower salary.

On November 6, 1980, Hadley filed this action seeking damages in the amount of one million dollars. He alleged that the Du Page County Board violated his Fourteenth Amendment right to due process by failing to provide him with a hearing either before or after his termination. He asserts that this constitutional violation deprived him of a "property interest" in his continued employment as the Superintendent of the Du Page County Public Works Department and also a "liberty interest" in maintaining his reputation in the community.

The defendants moved for summary judgment. The district court determined that there was no material issue of fact and concluded that the motion for summary judgment was ripe for disposition. In deciding that motion, the district court held that the plaintiff's pleadings and affidavits failed to establish either a "property interest" in his continued employment or a violation of a "liberty interest" in his reputation in the community. The court held that Hadley had no right to a hearing under the Fourteenth Amendment and granted summary judgment to the defendants. The plaintiff now appeals.

II.

Before reaching the main questions to be examined in this opinion, one lesser issue must be dealt with. The plaintiff in his reply brief asserts that his dismissal by the defendant Knuepfer was an illegal act because it was carried out without prior consent of the County Board.

Based on that assertion, Hadley implies that this somehow warrants relief from this court. The plaintiff is correct in asserting that a county board chairman in Illinois has no power to act individually absent statutory or board authorization. *See County of Stephenson v. Bradley and Bradley, Inc.*, 2 Ill. App. 3d 421, 275 N.E.2d 675, 678 (1971). This legal principle, however, does not justify granting the plaintiff's requested relief. Since the County Board subsequently ratified and approved Knuepfer's action on December 26, 1978, and thereby made the termination legally binding, the fact that Knuepfer initially acted without prior Board consent is irrelevant.

The main issues to be determined in this appeal are: (1) whether, in the present context, there was a material issue of fact as to the existence of a property interest in continued employment which gave rise to a due process right to notice and hearing under the Fourteenth Amendment before that employment could be terminated; and (2) whether there was a material issue of fact as to the existence of a liberty interest which gave rise to a due process right to notice and hearing under the Fourteenth Amendment.

With regard to the granting of summary judgment, our circuit has stated that:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case demonstrate that, except as to the amount of damages, 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' F.R.Civ.P. 56(c).
>
> * * *
>
> "The party moving for summary judgment has the burden of clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in his favor. The issue of material fact required to be present need not be resolved conclusively in favor of the party asserting its existence, but the

> movant need only show that sufficient evidence supporting the claimed factual dispute does not require a jury or judge at trial to resolve the parties' differing versions of the truth. All inferences to be drawn from the facts contained in the affidavits, exhibits, and depositions are to be drawn in favor of the nonmovant. . . . Upon review of a summary judgment we are obliged to review the entire record in the light most favorable to the opponent of the movant."

Cedillo v. Int'l Ass'n of Bridge, Etc., 603 F.2d 7, 9, 10-11 (7th Cir. 1979) (citations omitted). With these standards in mind we can now review the facts to determine whether the plaintiff raised a material issue of fact as to the existence of either a property interest, or a liberty interest.

A.

The Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564 (1972), that:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite."

408 U.S. at 569-70 (footnote omitted). The key, therefore, is the "nature" of the interest at stake.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> * * *
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or under-

> standings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Id. at 577.

Hadley asserts that he had a legitimate expectation of job security rising to the level of a property interest protected by the Due Process Clause of the Fourteenth Amendment. He does not claim that this property interest arose out of any contract or statute. This, however, is not fatal to his claim since the Supreme Court, in *Perry v. Sindermann*, 408 U.S. 593 (1972), recognized the possibility of "*de facto*" tenure which could give rise to a property interest.

Perry involved a non-tenured professor who, after teaching in the Texas state college system for ten years, was denied a renewal of his annual one-year contract without a prior hearing. Notwithstanding the fact that the college system did not have a formal tenure procedure, he alleged that he had a property interest which, "though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program." 408 U.S. at 599-600. The plaintiff in *Perry* based his assertion of *de facto* tenure on his employer's official Faculty Guide, which contained a provision which stated that a faculty member should feel secure that he had permanent tenure as long as his services were satisfactory and he displayed a cooperative attitude toward his co-workers. *Id.* at 600.

The *Perry* Court defined the nature of a protected property interest as follows:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Id. at 601. The Court, in its application of this standard to the plaintiff's claim of *de facto* tenure, stated that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id.* at 602. It concluded that the plaintiff "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'" *Id.* at 603 (*quoting Sindermann v. Perry*, 430 F.2d 939, 943 (5th Cir. 1970)).

Hadley claims that, like the plaintiff in *Perry*, he had *de facto* tenure with Du Page County and therefore had a property interest which was deserving of protection under the Fourteenth Amendment Due Process Clause. He presents three separate arguments for his assertion of *de facto* tenure: (1) that he was given assurances by several individual Board members that he would retain his position as long as his job performance was satisfactory; (2) that Du Page County had an unwritten policy of not firing long-standing employees without a hearing; and (3) that he had a reasonable expectation based on his fourteen years of continuous and satisfactory job performance.

Hadley's affidavit asserted that he had been given verbal assurances of job security.

> "During all of his said employment, affiant was assured by the then incumbent members of the Du Page County Board and his other superiors, that his job as Superintendent of Public Works was secure and would not be terminated so long as affiant performed his duties in an efficient and satisfactory manner."

These assurances by Board members and superiors fail to establish a property interest in continued employment, however, as individual members of a county board in Illinois *do not* have the authority to bind a county to contracts. *See County of Stephenson v. Bradley and Bradley, Inc.*, 2 Ill. App. 3d 421, 275 N.E.2d 675 (1971); *County of Will v. George*, 103 Ill. App. 3d 1016, 431 N.E. 2d 765 (1982); *Sexton v. Cook County*, 114 Ill. 174, 28 N.E.

608 (1885); *Cawley v. The People*, 95 Ill. 249 (1880); and Ill. Rev. Stat. ch. 34, § 302 (1972). To create a justifiable and reasonable expectation of job security, and thereby establish a property interest, there must be a mutually explicit understanding between the parties. *Perry*, 408 U.S. at 601; *Webster v. Redmond*, 599 F.2d 793, 801 n.13 (7th Cir. 1979), *cert. denied sub nom., Webster v. Board of Education of the City of Chicago*, 444 U.S. 1039 (1980). No property interest can arise from the above-mentioned assurances since the County Board is not bound by the unofficial acts and statements of its individual members, and therefore cannot be a party to any mutually explicit understanding; where the mutuality of the parties' understanding is required to meet the standards set forth in both *Roth* and *Perry*. *Cf. Fiorentino v. United States*, 607 F.2d 963 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980); and *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Any claim of entitlement to public employment based on these assurances was, at best, only a unilateral expectation which is insufficient to support a property interest. *Roth*, 408 U.S. at 577. Since mutuality would require an assurance from the County Board itself, and since there has been no showing that the County Board ever officially made such an offer or promise of continued employment, Hadley's attempt to establish a property interest based on the unauthorized statements of individual Board members must fail.

Apart from these assurances, Hadley also claims that Du Page County had an unwritten policy of not firing employees absent a hearing. In his affidavit he asserted:

> "Subsequent to affiant's termination on or about December 20, 1978, without just cause and without a hearing, the County of Du Page formally adopted a code of personnel policy which in fact merely codified and formalized the existing grievance procedures which formed the basis for affiant's belief and expectancy that he would be accorded prior notice and a prior hearing as to any basis for dissatisfaction

> with the performance of his duties as Superintendent of Public Works."

At the outset it should be pointed out that Hadley fails to substantiate this affirmation in any way. In his brief he indicates that this averment is uncontested. The fact that this general and non-specific statement is uncontested is of no real advantage to Hadley since Federal Rule of Civil Procedure 56 specifically states:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial."

Fed. R. Civ. P. 56(e) (emphasis added). Hadley's affidavit is nothing more than a mere allegation that these policies existed at the time of his termination. It appears to this court that Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted. Hadley's affidavit falls far short of this, as it fails to demonstrate the existence, at the time of his termination, of any personnel policy covering the procedures to be followed when dismissing an employee. *Cf. Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1103 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

Assuming for the sake of argument, however, that the personnel policy adopted 1½ years after Hadley's dismissal actually existed in an unwritten form at the time of his termination, Hadley still fails to establish a property interest in his continued employment since that personnel policy excluded department heads, like Hadley, from its protection. Under Illinois law, Hadley, as Superintendent of Public Works, was categorized as an

unclassified service employee.[2] The personnel policy referred to by Hadley specifically created a procedure governing the hearing rights of employees in the unclassified service. It provides as follows:

> "Employees in the unclassified service, as defined in Chapter 34, Section 860-3, Illinois Revised Statutes, do not have the right of appeal to the Personnel Policy Commission. They do, however, have the right of appeal to the Executive Committee of the County Board *except that this provision shall not apply to Department Managers*, their chief deputies, assistant chief deputies and first assistants and second assistants to department managers."

Du Page County Board Personnel Policy, ch. 6 § 6.5 (1981) (emphasis added).

This provision specifically excluded Hadley from the protection given to *classified employees* that their "employment [would] continue if [their] work [had] been satisfactory . . . ." Du Page County Board Personnel Policy, ch. 2, § 2.1 (1981). In addition, since Hadley was both an unclassified service employee and a Department Manager, § 6.5 barred him from receiving the protection which other unclassified employees were given, that is, the right to appeal to the Executive Committee of the County Board. Note that § 6.5 states: "except that this provision shall not apply to Department Managers . . . ." Therefore, Hadley had no procedural rights under the personnel policy adopted by the County Board after

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[2] "860-3 Classified and unclassified service

"§ 3. The county service shall be divided into the classified and unclassified service. All offices and positions of the county shall be in the classified service unless specifically designated as being in the unclassified service by this Act. Positions in the unclassified service shall include the following:

* * *

"(2) department managers;"

Ill. Ann. Stat. ch. 34, § 860-3 (Smith-Hurd Supp. 1983).

his dismissal. Absent such procedural rights, he was essentially an employee at will without a legitimate expectation of continued employment and therefore was without a property interest protectable under the Fourteenth Amendment. *See, e.g., Abraham v. Pekarski*, 537 F. Supp. 858, 869 (E.D. Pa. 1982); and *Bollow*, 650 F.2d at 1100 n.6.

Even if we were to agree that Hadley did have the right to appeal to the Executive Committee (which we do not), that procedural right would not give rise to a property interest protected under the Fourteenth Amendment. As we recently stated in *Lyznicki v. Bd. of Ed., Sch. Dist. 167, Cook Cty.*, 707 F.2d 949, 952 (7th Cir. 1983):

> "A mere right to notice and a hearing, which places no more constraint on the employer's freedom of action than is inherent in having to confront the employee in a public forum, does not change the essential character of the employment relationship as one of employment at will; it does not convert it into a form of tenure employment and thus create a Fourteenth Amendment property right. There is too much authority to this effect in this circuit, see, e.g., *Endicott v. Huddleston*, 644 F.2d 1208, 1214 (7th Cir. 1980), for us to regard the question as an open one."

Thus, if the County's personnel policy did give Hadley the right to a hearing, that alone would not give him a property interest cognizable under the Fourteenth Amendment. This is especially true since the plaintiff, according to the district court's decision, apparently never requested a hearing, Dist. Ct. memo. dec. at 2, and now seems to have refused to participate in a hearing offered by the Du Page County Board, Plaintiff-Appellant's brief at 7.

Finally, the plaintiff appears to argue that the mere fact of his employment with Du Page County for fourteen continuous years gives rise to an entitlement of continued employment and therefore a property interest under the Fourteenth Amendment. We hold this argument to be without merit. "Longevity alone does not create a prop-

erty interest." *Bollow*, 650 F.2d at 1099. *See also Grimes v. Eastern Illinois University*, 710 F.2d 386, 387 (7th Cir. 1983).

Thus, Hadley has failed to establish the mutually explicit understanding of entitlement to the benefit of continued employment with Du Page County necessary in order to give rise to a property interest, and therefore has failed to establish *de facto* tenure under *Perry*. As the district court stated: "Hadley's subjective expectation of continued employment, if any, was purely unilateral and as such is insufficient to state a property interest protected by the Fourteenth Amendment." Dist. Ct. memo. dec. at 5. *See Board of Regents v. Roth*, 408 U.S. at 577; and *Uptown People's Com., Etc. v. Bd. of Com'rs, Etc.*, 647 F.2d 727, 734 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981). Summary judgment was properly granted on Hadley's claim of a property interest in his continued employment with Du Page County.

B.

Hadley also alleges that he had a right to a due process hearing under the Fourteenth Amendment because of the County's violation of his liberty interest.

> "The concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities."

Lipp v. Board of Education of City of Chicago, 470 F.2d 802, 805 (7th Cir. 1972); *Board of Regents v. Roth*, 408 U.S. at 573-74 (1972). The Seventh Circuit qualified the preceding statement by stating:

> "But not every remark which may arguably affect one's reputation violates due process if made by a government official without a hearing, for the fourteenth amendment protects only against charges that 'might seriously damage [one's] standing and associations in his community.'"

Lipp, 470 F.2d at 805 (*quoting Roth*, 408 U.S. at 573).

Hadley cites to 43 newspaper articles in which he asserts that the defendants' actions and statements relating to his termination resulted in a "stigma" to his reputation and thereby gave rise to a right to a hearing under the Fourteenth Amendment. A careful examination of these articles leads us to a different conclusion. In the first instance, our review indicates that a majority of the articles are attributable to sources other than the defendants in the present action. In addition, many of the articles make no reference to Hadley. There is, however, a third group of articles which are both attributable, in part, to one or more of the defendants and do mention Hadley by name, but contrary to Hadley's contentions, the statements attributable to the defendants which refer to Hadley are not stigmatizing.

The only reason ever given for Hadley's dismissal was his failure to meet the level of management skill required to properly and efficiently administer the Department of Public Works. In fact, when Hadley was fired and the reasons were announced, defendant Knuepfer stressed that the firing was due to Hadley's dismal record of management or mismanagement rather than any pending criminal indictments or his health. All of the articles which quote Mr. Knuepfer, or any other defendant on the subject of Hadley's dismissal, clearly indicate that the reason for his termination was his failure to adequately manage the department and not because of any criminal investigation or health problems.

The Seventh Circuit has taken the position that a mere charge of mismanagement is not enough to give rise to a liberty interest requiring a hearing.

> "We are satisfied that plaintiff has failed to state a claim under either branch of the *Roth* liberty test. An unelaborated charge of 'incompetence, neglect of duty and malfeasance of office' is of a different order of magnitude than charges of dishonesty, immorality, disloyalty, Communism, subversive activities, alcoholism or narcotics violations."

Adams v. Walker, 492 F.2d 1003, 1008-09 (7th Cir. 1974). In *Paige v. Harris*, 584 F.2d 178 (7th Cir. 1978) our court stated that:

> "charges of inadequate performance in the areas of 'Technical Expertise and Poor Judgment' and 'Supervisory Performance' and the alleged facts behind the charges, do not rise to the level of the 'degrading' and 'unsavory' charges which would 'expose him to public embarrassment and ridicule . . . .'"

Id. at 184 (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971)). The court continued by stating:

> "The cases cited in *Roth* 'involved charges of chronic alcoholism or association with subversive organizations, and . . . by "stigma" the Court was "thinking of something considerably graver than a charge of failure to perform a particular job lying within the employee's power to correct." [*Russell v. Hodges*, 470 F.2d 212 (2d Cir. 1972)] at 217.'"

Paige, 584 F.2d at 184 (*quoting Schwartz v. Thompson*, 497 F.2d 430, 432 (2d Cir. 1974)). *See also Abeyta v. Town of Taos*, 499 F.2d 323, 327 (10th Cir. 1974).

Hadley takes particular issue with the following paragraph which appeared in a newspaper article six days after his dismissal.

> "While announcing Hadley's firing last week, Knuepfer stressed that his action was based not on any pending criminal indictments, but rather on Hadley's record of management, or mismanagement."

Daily Journal (Dec. 26, 1978). He argues that Board Chairman Knuepfer's citation to "any pending criminal indictments" in his qualification of the reasons for Hadley's termination, was stigmatizing. According to Hadley, since no grand jury indictments ever actually issued, the mere reference to "pending" criminal indictments was stigmatizing to his reputation. Hadley misconstrues Chairman Knuepfer's use of this qualifying phrase. By referring to "any pending criminal indictments," Knuepfer was attempting to make it eminently clear that the discharge was due to business and administrative mis-

management and not to any possible criminal activity. The fact that he used the words "*any pending* criminal indictments" indicates that no criminal indictments had actually issued but that an on-going investigation into the activity of the Public Works Department existed and that, as the newspaper columns had previously indicated, criminal charges might result from that investigation. Thus, all Knuepfer's statement did was emphasize that the sole reason for Hadley's termination was his failure to adequately manage the Department. Possibly a trained public relations expert could have enunciated the reason for Hadley's discharge more tactfully, however, the language actually used was not, in itself, stigmatizing.

Hadley also argues that defendant Knuepfer actually meant "criminal" mismanagement when he used the term "mismanagement." To support this argument he quotes an article printed on November 24, 1980, almost two years after Hadley's termination. That article states:

> "Knuepfer also mentioned the falsification of reports submitted to the Illinois Environmental Protection Agency (EPA) as evidence of mismanagement."

Suburban Trib (Nov. 24, 1980). Hadley claims that this statement indicates the particular meaning Knuepfer intended to convey in his use of the word "mismanagement," i.e., that Hadley was involved in criminal or dishonest activity. The conveyance of this meaning, according to Hadley, so significantly damaged his reputation that a due process hearing was required, under the Fourteenth Amendment, in order to give him the opportunity to clear his name.

There are two problems with Hadley's argument: (1) the length of time between Hadley's termination and the article; and (2) the clear and unambiguous reasons enunciated at the time of Hadley's termination. First of all, in order for a slur on Hadley's reputation to give rise to a liberty interest requiring a due process hearing, it must occur at or near the time of Hadley's termination since that is when the liberty interest arises, if at all. As the Supreme Court stated in *Paul v. Davis*, 424 U.S. 693 (1976):

> "Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; *the defamation had to occur in the course of the termination of employment.*"

Id. at 710 (emphasis added). Interpreting the *Davis* decision, our court stated:

> "stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. § 1983 for deprivation of a Fourteenth Amendment liberty interest without due process."

Collaizzi v. Walker, 542 F.2d 969, 973 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977) (emphasis original). This has become known as the "stigma plus" test. The key, therefore, is that the defamation must "occur in the course of the termination of employment." *Davis*, 424 U.S. at 710. Thus, "[t]here comes a point in time when post termination publication of defamation becomes sufficiently remote from the termination itself so as to make it no longer within 'the course of termination of employment,'" thereby eviscerating the nexus required by the stigma plus test. *Duggan v. Town of Ocean City*, 516 F. Supp. 1081, 1085 (D. Md. 1981) (*quoting Davis*, 424 U.S. at 710). *Cf. Owen v. City of Independence*, 445 U.S. 622, 633-34 n.13 (1980) (impliedly recognizing that the timing of publicizing alleged defamation is a relevant factor in assessing the existence of a liberty interest). We hold that Knuepfer's statement, almost two years after Hadley's termination, does not give rise to a liberty interest since the requisite nexus between the allegedly stigmatizing statement and the date of Hadley's dismissal is nonexistent, i.e., it was too remote in time to meet the stigma plus test. Although Knuepfer's statement might be defamatory, defamation alone does not give rise to a liberty interest protected by the Fourteenth Amendment. *See*

Colaizzi v. Walker, 542 F.2d 969, 973 (7th Cir. 1976); and *Paul v. Davis*, 424 U.S. 693, 710 (1976).

Even if we assume, for the sake of argument, that the requisite nexus existed, the articles published *at the time* of Hadley's termination are unambiguous. The stated reason for his dismissal was mismanagement and not "any pending criminal indictments" or on-going criminal investigation. Thus, the reasons given for Hadley's termination do not include any inference of dishonest or criminal misconduct. Therefore, Hadley's citation to a statement made some two years after his termination fails to support his argument. It must be remembered that the present appeal only deals with the question of whether Hadley had a constitutional right to a hearing and does not decide whether he had or has other state remedies available.

Finally, Hadley argues that he had a right to a hearing to clear his name since his discharge occurred in the "midst of defamatory charges" against himself, that is, his dismissal took place during an "entirely stigmatizing atmosphere." We hold that this argument is without merit. Because this suit is based on 42 U.S.C. § 1983, Hadley is required to allege governmental action which infringed upon his particular rights. If his injury does not result from governmental action, then he has no cause of action against the defendants under that section. The plaintiff's pleadings and affidavits have failed to establish that it was *the defendants' actions or statements* that resulted in his alleged deprivation of due process as he has failed to cite a specific statement made by the defendants which resulted in any "stigma" to his reputation.

Turning now to the second prong of the *Roth* analysis as explained in *Lipp* (i.e., his freedom to take advantage of other employment opportunities), we recognize that the present termination and the reasons given therefore have affected, and may in the future affect, Hadley's employment opportunities.

> "But not every negative effect upon one's attractiveness to future employers violates due process if it

> results without a hearing. If the government were to deny a person a license necessary to practice his profession, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), or were to diminish his chances of obtaining employment significantly, *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915), the due process clause might operate to require a hearing."

Lipp, 470 F.2d at 805. The stated reason of mismanagement, however, while it may affect his desirability does not foreclose other employment opportunities and therefore did not require the County Board to provide a hearing. As the district court held in the present case,

> "Public employees must be amenable to discharge if they fail to perform their duties adequately, and public officials must be able to tell the truth.
>
> * * *
>
> "Clearly, an explanation of termination of employment for mismanagement cannot be held to be constitutionally stigmatizing. Any employment discharge will carry with it some damage to the employee's reputation, but that does not, as such, violate any constitutional right."

Dist. Ct. memo. dec. at 7, 8.

For the foregoing reasons, we hold that Hadley had neither a property nor a liberty interest as defined in the Fourteenth Amendment Due Process Clause, and he therefore failed to establish a right to a hearing. Thus, we hold that the district court correctly granted summary judgment to the defendants. AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RORERT W. HADLEY, Plaintiff,	)	
vs.	)	NO. 80 C 5959
COUNTY OF DU PAGE, a body corporate and politic, et al., Defendants.	)	

MEMORADUM OF DECISION

JOHN A. NORDBERG, District Judge:

Plaintiff, Robert W. Hadley ("Hadley") brought this action for damages under 42 U.S.C. sections 1983 and 1985 against defendants Du Page County and various individual members of the Du Page County Board alleging a deprivation of his constitutional right to due process upon his termination of employment as Superintendent Director of Public Works by the County Board.[1] This action is presently before the Court on defendants' motion for summary judgment. For the reasons set forth below, the motion is granted.

FINDINGS OF FACT

Hadley had been employed by Du Page County continuously from 1964. He was promoted to Superintendent Director of Public Works in 1970 and served in that capacity until his discharge on December 20, 1978. The stated reason for Hadley's termination was the Board's dissatisfaction with his ability to efficiently manage the department. Several months prior to Hadley's dismissal, the States

[1] Jurisdiction is conferred under 28 U.S.C. sections 1331, 1332 (a)(1), 1343(4)

Attorney for Du Page County instigated an investigation into alleged corrupt activities of the Department of Public Works. Both the investigation and Hadley's discharge generated widespread local newspaper coverage.[2] Hadley was not given, and apparently did not request, a hearing by the County Board. Hadley submitted a letter to the Board requesting re-instatement which was never answered. After several unsuccessful attempts to find employment in the Du Page County area, Hadley accepted a position at a lower salary with the Public Works Department in Orange County, Florida.

Requesting dollar damages only, Hadley's complaint alleges a violation by the County Board of his Fourteenth Amendment right of due process in failing to provide a hearing after his termination. He claims this alleged constitutional violation of procedural due process deprived him of his "property interest" in continued employment and his "liberty interest" in maintaining his employment reputation within the community.

MOTION FOR SUMMARY JUDGMENT

Since there is no genuine issue of material fact, defendants' motion for summary judgment is now ripe for disposition. In deciding a motion for summary judgment, the non-moving party is entitled to all reasonable infer-

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[2] Hadley suffered a nervous breakdown requiring hospitalization allegedly due to the publicity regarding the investigation prior to his termination. The newspaper articles published in the local press were derived from a variety of sources including public records, the Du Page County States Attorney, former Public Works Department employees, County Board members not named as delendants herein and several individual named defendants. (Memorandum of Law In Support of Defendants' Motion For Support Summary Judgment, Group Exhibit C)

ences that can be made in its favor from the evidence presented. *United States* v. *Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993 (1962); *Montoux* v. *Gulling Auto Electric, Inc.*, 295 F.2d 573, 576 (7th Cir. 1961). The Seventh Circuit has noted that "[w]ith the ever increasing burden upon the judiciary, persuasive reasons exist for the utilization of summary judgment procedure whenever appropriate." *Kirk* v. *Home Indemnity Co.*, 431 F.2d 554, 560 (7th Cir. 1970).

PROPERTY INTEREST

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 675, 92 S.Ct. 2701 (1972). A person claiming such an interest must have more than a unilateral expectation of that benefit. He must have a legitimate claim of entitlement to it. *Board of Regents* v. *Roth, supra*, 408 U.S. at 577. The *Roth* Court goes on to note that these property interests" . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Roth, supra*, 408 U.S. at 577.

Hadley claims tha he had a legitimate expectation of job security rising to the level of a property interest protected by the due process clause of the Fourteenth Amendment. He argues that his fourteen years of employment with the County coupled with the County's personnel policies impliedly created his "property interest" in continued employment. As such, he alleges that a pre-termination hearing was constitutionally required to protect his interest.

The Supreme Court in *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694 (1972) recognized the possibility of a "de facto" tenure property interest where a non-tenured teacher, who had been with the Texas teaching system for ten years, was denied renewal of his one year contract without a prior hearing. The *Perry* Court stated that there may be an unwritten "common law" in a particular state institution that certain employees shall have the equivalent of tenure and this was particularly likely in a university, like that involved in the case, that had no explicit tenure system. *Perry* v. *Sinderman, supra*, 408 U.S. at 602.

In the case at bar, Hadley was employed at the will of the County Board. Du Page County had no written personnel policy prior to his discharge. Several years later, the County adopted a written personnel policy but it excluded supervisory personnel, such as Hadley's position, from its coverage. Plaintiff's Memorandum of Law In Opposition To Defendants' Motion For Summary Judgment, Exhibit B, "Du Page County Board Personnel Policy", section 6.5. Hadley received no guarantee from the Board regarding future employment, and any implied promises he claims he gleened from several individual Board members were legally ineffective to bind the current or any future County Board. Hadley's subjective expectation of continued employment, if any, was purely unilateral and as such is insufficient to state a property interest protected by the Fourteenth Amendment. *See Edincott* v. *Huddleston*, 644 F.2d 1208, 1214 (7th Cir. 1980), *Bishop* v. *Wood*, 426 U.S. 341, 344-45, 96 S.Ct. 2074 (1976), *Bleeker* v. *Dukakis*, 665 F. 2d 401, 403 (1st Cir. 1981).

LIBERTY INTEREST

"The concept of liberty recognizes two particular interests of a public employee: 1) The protection of good name, reputation, honor, and integrity, and 2) his freedom to take advantage of other employment opportunities." *Lipp* v. *Board of Education of City of Chicago,* 470 F.2d 802, 805 (7th Cir. 1972). The Supreme Court has noted that to adequately allege a violation of the first of these interests, the charges made by defendants must rise to the level of being "degrading" and "unsavory" exposing plaintiff "to public embarrassment and ridicule. . ." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 436-37, 91 S.Ct. 507 (1971). In fact, the Seventh Circuit noted that "(d)efamatory publications by a state official, however seriously they may harm someone, do not deprive that person of any liberty interest protected by the due process clause. *Paul* v. *Davis,* 424 U.S. 693, 712, 96 S.Ct. 1155 (1976)". *Elbert* v. *Board of Education of Lanark Community Unit,* 630 F.2d 509 (7th Cir. 1980).

The test for an infringement upon a liberty interest protected by the Fourteenth Amendment has been further articulated by the Seventh Circuit: "(S)tigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless, when found in conjunction, state a claim under 42 U.S.C. section 1983 for deprivation of a Fourteenth Amendment liberty interest without due process." *Colaizzi* v. *Walker,* 542 F.2d 969, 973 (7th Cir. 1976), *cert. den.* 430 U.S. 960 (1976); See also, *Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1976).

In *Colaizzi, supra,* the "stigma" involved was a press release issued by the governor upon plaintiffs' discharge. Plaintiffs were terminated from their positions with the Illinois Department of Labor without a hearing. The governor's press release charged plaintiffs with abuse of their official positions in attempting to force a company under their supervision to drop criminal actions against an employee.

Colaizzi, with its apparent criminal allegations, can clearly be distinguished from the instant action. Hadley was terminated for mismanagement and the defendants were careful to give only an accurate explanation when requested to do so.[3] Public employees must be amenable to discharge if they fail to perform their duties adequately, and public officials must be able to tell the truth.

Hadley argues that the alleged statements made by certain of the defendants' unmistakably imply dishonesty on his part and criminal wrongdoing. He claims that the numerous newspaper articles covering his dismissal and the ongoing criminal investigation "in one breath" impugned his integrity. Hadley alleges that he was unable to find comparable employment in the Due Page County area due to this adverse publicity.

Viewing the evidence in a light most favorable to the plaintiff, as the Court must do in deciding a motion for summary judgment, the Court finds the defendants did not harm Hadley's reputation. In fact, there seems to be little more that the defendants could have done to protect his reputation under the circumstances. Much of the publicity complained of cannot be attributed to any of the

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[3] The bulk of newspaper articles complained of are attributable to sources other than the defendants.

named defendants. The Chairman of the County Board stated publicly that Hadley's termination had nothing to do with any pending criminal indictments or even with his health. He emphasized that the sole reason for Hadley's dismissal was the Board's dissatisfaction with his level of management. Many of the newspaper articles complained of purport to use other sources of information, including the States Attorney of Du Page County, former employees of the Public Works Department, and public records (including the complaint in the instant action).

The charges which form the basis for Hadley's termination do not create the type of "stigma" contemplated in either *Colaizzi* v. *Walker, supra* or *Lipp* v. *Board of Education, supra*. The Supreme Court noted that the stigma must relate to charges of dishonesty, immorality or criminality. *Board of Regents of State Colleges* v. *Roth*, 448 U.S. 564, 573, 92 S.Ct. 2701 (1972). Clearly, an explanation of termination of employment for mismanagement cannot be held to be constitutionally stigmatizing. Any employment discharge will carry with it some damage to the employee's reputation, but that does not, s such, violate any constitutional right. "Section 1983 is not, and should not become, a general federal tort law." *Elbert* v. *Board of Education of Lanark Community Unit*, 630 F.2d 509, 513 (7th Cir. 1980).

The Supreme Court stated:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The

> Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. *Bishop* v. *Wood*, 426 U.S. 341, 349-50, 96 S.Ct. 2074 (1976)

Hadley also argues that his alleged inability to find comparable employment in the Du Page County area strengthens his claim of constitutional "stigma". The *Roth* Court, however, stated: "Mere proof . . . that the nonretention (discharge) in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty." *Board of Regents of State Colleges* v. *Roth, supra*, 408 U.S. 564, 575 fn. 13, 92 S.Ct. 2701 (1972).

CONCLUSION

The instant action is not one under contract or tort. The only basis for the claim is Hadley's lack of a public hearing wherein the defendants would have been forced to detail various acts of his mismanagement of the Public Works Department in explaining the decision to terminate his employment. Yet, the plaintiff apparently never requested a public hearing and does not request one now. There has been no violation of Hadley's liberty or property interests protected by the Fourteenth Amendment. Therefore, there is no basis for his claim under section 1983.

Accordingly, defendants' motion for summary judgment is granted. It is so ordered.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: July 6, 1982